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No. 81-2272

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PAULINE MULLINS, HAPPY DAY, INC.,
and
BROWN BEAR, INC., - - - - - Petitioners,
versus
COMMONWEALTH OF KENTUCKY, - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

WILLIAM J. WEBB
Assistant Campbell County Attorney and Special Assistant Attorney General

JUSTIN D. VERST
Assistant Campbell County Attorney and Special Assistant Attorney General
331 York Street
Newport, Kentucky 41071
Telephone: (606) 491-5843
Attorneys for Respondent, Commonwealth of Kentucky

WESTERFIELD-GOETZ CO., 600 W. KENTUCKY-P.O. BOX 2301, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Should Certiorari be denied when none of the considerations governing review are present?

2. Sufficiency of the search warrant.

3. Alleged prosecutorial misconduct.

4. Constitutionality of the Commonwealth of Kentucky obscenity statute K.R.S. 531.010 et seq. as written and applied.

5. Rejection of "tolerance" standard in jury instructions for determining contemporary community standards.

6. Allegation that petitioner's rights to disseminate materials were impermissibly chilled.

7. "General" versus "specific" knowledge of the nature, character, and content of the sexually explicit materials in question.

8. Obscenity as a matter of law.

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BRIEF FOR RESPONDENT

The Respondent respectfully prays that the Petitioners' Petition for a Writ of Certiorari be denied.

OPINION BELOW
JURISDICTION
CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Rule 34.2 of the Supreme Court of the United States, the subject areas referred to above, with appendixes, have been presented by the Petitioners to the satisfaction of the Respondent. Furthermore, all parties to the proceedings in the Kentucky courts are listed in the caption.

STATEMENT OF THE CASE

Again, pursuant to Rule 34.2, the Respondent takes issue with only the portions of Petitioners' statement of the case as to be addressed herein.

At the suppression hearing held herein, the Commonwealth made a continuing objection to the questioning of Officer Collins relative to his interpretation of the Kentucky obscenity statutes. Although the court allowed said questioning for the limited purpose of that hearing, it is clear that the only relevant issue was the determination of probable cause made by the issuing magistrate. The motion to suppress was overruled.

At the trial below, the testimony disclosed that Pauline Mullins was the only employee found on duty and inside the establishment known as the Cinema X Theatre at the time of the execution of the search warrant. It further disclosed that one of the two films seized and later found obscene was being shown at that same time. As stated by Petitioners, the charge as to Pauline Mullins was amended with leave of the court to Criminal Facilitation at Distribution of Obscene Matter.

As to the other Petitioners at the trial below the evidence disclosed that Brown Bear, Inc. not only owned the Cinema X building, but also that it continued to provide Workman's Compensation coverage for Cinema X employees and had the same sole office holder as Happy Day, Inc. Happy Day, Inc. was stipulated to being the license holder for the Cinema X Theatre,

filed payroll reports for that entity, and was controlled by the same family as Brown Bear, Inc.

REASONS FOR DENYING WRIT

I.

None of the Considerations Listed in Rule 17 Are Applicable in the Case at Bar.

Although obviously not controlling, Rule 17 of the Rules of this Court indicates the character of reasons that will be considered in a petition for writ of certiorari. Since the Kentucky Courts have accepted and followed the applicable federal law, as will be shown herein, the petition should be denied.

II.

A Search Warrant Based Upon a Sufficient Affidavit and Based Upon a Review of the Sexually Explicit Materials by an Impartial Magistrate is Constitutionally Sufficient.

There is no basis to the petitioners' arguments that the trial court erred in overruling their motion to suppress. The seizure of the two motion pictures involved herein was not accomplished in violation of the Fourth Amendment to the U. S. Constitution, nor in violation of the Kentucky Constitution, and the seizure in question followed the specific dictates of Kentucky and federal case decisions.

A warrant, issued by a judge after reviewing allegedly obscene films, is one permissible way to evaluate the probable cause for the issuance of a search

warrant and the seizure of the films alleged to be obscene. *Crecelius* v. *Commonwealth*, Ky. 502 S. W. 2d 89 (1973), and *Western Corporation* v. *Commonwealth*, Ky., 558 S. W. 2d 605 (1977), and *Heller* v. *New York*, 413 U. S. 483 (1973), and *Roaden* v. *Kentucky*, 413 U. S. 496 (1973).

In addition, a search warrant issued by a judge based upon an affidavit of a police officer who has viewed the films alleged to be obscene, is also a proper way to establish the probable cause necessary for the issuance of the search warrant and the seizure of the films.

Either of the above two procedures can form the proper basis to establish probable cause and issue a search warrant for the seizure of allegedly obscene material. In the case at hand, the search warrant was issued based upon the probable cause established through examination of the affidavit of a police officer and also based upon the magistrate's own personal viewing of the films in question.

In *Heller* v. *New York, supra*, the U. S. Supreme Court went into great detail in laying out their requirements for the seizure of motion picture films and established guidelines that were specifically followed in the case at hand. In the case at hand, the magistrate, Judge Kopowski, had not in any way become a "member" or "leader" of the police operation as such was prohibited under the case of *Lo-Ji Sales, Inc.* v. *New York*, 422 U. S. 319, 327 (1979). The only connection the magistrate in the within case had with the matter was to view the films and sign the search war-

rant after his viewing of the films and after reviewing the affidavit of the police officer. He in no way participated in the investigation or the operation as was done in the *Lo-Ji Sales* case. Additionally, it should be pointed out that the magistrate who issued the search warrant was not the trial judge and therefore, there was no interjection of evidentiary disputed facts into the trial of the case as alleged by the petitioners.

III.

The Commonwealth's Closing Argument Was Proper and Did Not Constitute Prejudicial Error.

There was not, during closing arguments, improper comments that in any way vitiated the petitioners' constitutional protections.

An advocate may refer to any matters in evidence and may suggest any inferences which may fairly be drawn from the evidence. An advocate may be given reasonable latitude in arguing the implications of the evidence. *Richards* v. *Commonwealth,* Ky., 517 S. W. 2d 237 (1975); *Koonce* v. *Commonwealth,* Ky., 452 S. W. 2d 822 (1970). Indeed, it is error for the court to restrict the right of advocate to make comment on the evidence. *Woodford* v. *Commonwealth,* Ky., 376 S. W. 2d 526 (1964).

Further, whenever a jury is authorized to set the punishment for an offense, an advocate may refer to any relevant matters before the jury in support of any punishment authorized by law and strong appeals for severe punishment because of the gravity of the offense

or class of offenses are proper. *Harness* v. *Commonwealth,* Ky., 475 S. W. 2d 485 (1972); *Hamilton* v. *Commonwealth,* Ky., 401 S. W. 2d 80 (1966).

Furthermore, although an advocate may not introduce improper matters into the closing arguments initially, he may refer to otherwise improper matters in the course of reasonable retaliation based upon matters introduced by his adversary. *Meyer* v. *Commonwealth,* Ky., 472 S. W. 2d 479 (1971); *Hunt* v. *Commonwealth,* Ky., 466 S. W. 2d 957 (1971); *White* v. *Commonwealth,* Ky., 394 S. W. 2d 770 (1965).

In the case at hand, a review of the entire record will indicate that the arguments of the Commonwealth were proper within the purview of the authority cited above and the court did not err in refusing to grant the defendants a mistrial.

As to the petitioners' assertion that the prosecutor commented on petitioners' failure to take the stand, a review of the transcript will show that the statement "did he (Mr. Plummer) bring them in here to say that's a mistake", the "them" referred to is not even the petitioners, but rather the telephone records or someone from the telephone company concerning those records. Such was proper rebuttal to the "testimony" of Mr. Plummer in his closing argument about the lack of a corporate change of name from Brown Bear, Inc. to Happy Day, Inc. on the telephone records being a mistake when there was no such testimony on behalf of the defendants. There was no comment whatsoever concerning the petitioners not taking the stand.

The comments of the Commonwealth concerning the lack of enough prior prosecution and the lack of community tolerance as to the films shown at the Cinema X were proper in response to defense counsel's arguments that innumerable similar films had been shown at the Cinema X during the nine years prior to the case at hand and that since there was only one prior prosecution, there must not have been anything wrong with all the other films.

The Commonwealth's argument concerning the lack of credentials and credibility of one of the defense expert witnesses and her institute for the advancement of human sexuality was proper comment, based upon the testimony in the case as to the experts from said institute having testified on numerous occasions for the defense in pornography trials and as to the testimony concerning the institute providing surrogate partners to their clientele as part of their business.

The Commonwealth's arguments concerning reasonable doubt were proper in rebuttal to the arguments of defense counsel that there were reasonable doubts as to all the petitioners.

Thus, it can be seen under the authority noted above and considering the circumstances in which the arguments in question were made, there was no improper argument in violation of constitutional rights by the Commonwealth in its closing argument that would constitute reversible error. However, if there were any improper comments on behalf of the Commonwealth, said comments certainly constituted harmless error in light of the overwhelming evidence as to the obscenity

of the films in question and the guilt of all the petitioners.

IV.

The Commonwealth of Kentucky Obscenity Statute, KRS 531.010, Et Seq. Is Constitutional as Written and Applied.

The petitioners have raised various issues relating to the constitutionality of Kentucky Revised Statute 531.010, et seq. and Kentucky Revised Statute 506.080 as written and as interpreted and applied by the trial court.

In response to movants' arguments, the Kentucky pornography law, KRS 531.010, et seq. is not unconstitutional as written or applied in the case at hand nor does it fail to conform to the minimum standards set forth in *Miller* v. *California*. Kentucky's pornography law was specifically revised in 1974 to comply with the Supreme Court's mandate in *Miller* v. *California*, 415 U. S. 15 (1973).

Miller held:

> "The basic guidelines must be: (a) whether the average person applying contemporary community standards would find the work taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value." *Miller, supra*, 413 U. S. at p. 24. Under part (b) of the

test, it is adequate if the statute, as written or as judicially construed, specifically defines the sexual conduct, depiction of which is forbidden. The court in *Miller* offered examples of what a state might constitutionally choose to regulate: (1. patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.) (2. patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.) *Miller, supra,* 413 U. S. at 25.

KRS 531.010 (section 3) states:

Obscene means:

(a) to the average person applying contemporary community standards, the predominant appeal of the matter, taken as a whole, is to the prurient interest in sexual conduct, and

(b) the matter depicts or described the sexual conduct in a patently offensive way; and

(c) the matter, taken as a whole, lacks serious litrary, artistic, political, or scientific value.

(d) sexual conduct means acts of masturbation, homosexuality, lesbianism, beastiality, sexual intercourse, or deviant sexual intercourse, or physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification.

Pursuant to the guidelines of the *Miller* case, it is not necessary to define geographical community and it is not necessary to define prurient interest. The only definition required by *Miller* is that of sexual conduct.

The Kentucky pornography law, KRS 531.010(4), complies with that requirement. *Miller* held that the "state at large" is a constitutionally adequate standard as to a geographical community. The trial court properly ruled that the geographical community could and should be further limited to the geographical community of Campbell County, Kentucky. In the case of *Hambling* v. *United States,* 418 U. S. 87 (1974), in discussing the issue of geographical community, the court stated as follows:

> "The result of the *Miller* cases, therefore, as a matter of constitutional law and statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding which conclusion the average person, applying contemporary community standards would reach in any given case. Since this case was tried in the southern district of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that community upon which jurors would draw." *Hambling, supra,* at p. 101.

In the case at hand, in that the jurors who were to hear the case were by state law mandated to reside in the community of Campbell County, Kentucky, the trial court properly ruled that the geographical community whose standards were to be considered, was the community of Campbell County, Kentucky, where the jurors came from.

Furthermore, it is not necessary to define the specific illegal acts that are prohibited under KRS 531.010, et seq. These acts are not of a technical nature, and, therefore, are understandable by a reasonable person without further defining them. See *Gateway Construction Co.* v. *Wallbaum,* 356 S. W. 2d 247 (1961). Certainly, a reasonable person with common intelligence can understand what it means to prepare, publish, print, exhibit, distribute and offer or possess with intent to distribute obscene material.

The application of the statute in question does not reach activities which are absolutely protected by the First and Fourteenth Amendments. Obscene material is unprotected by the First and Fourteenth Amendments pursuant to the *Miller* case. Therefore, the activities which fall under the Commonwealth's pornography laws, KRS 531.010, et seq., are not protected by the First and Fourteenth Amendments based upon their being obscene. KRS 531.010 is in complete compliance with the Supreme Court guidelines and dictates as set out in the *Miller* case. There was, and is, no need for the courts of the Commonwealth of Kentucky to "authoritatively construe" Kentucky's obscenity law as suggested in the *Miller* case in that the Commonwealth's pornography law was specifically revised in 1974 to comply with the mandates of the *Miller* case. The authoritative construction suggested in the *Miller* case was merely an alternative to any actual revision of the state's pornography laws.

V.

Tolerance, Is Not the Standard To Be Applied In Determining Contemporary Community Standards.

First of all, it should be pointed out that the trial court did not instruct the jury that in determining the contemporary community standard the jury was to consider whether the motion picture films at issue were "accepted" in the community. The facts of the case will indicate that the court did refuse to instruct the jury that the standard to be applied was one of "tolerance".

KRS 531.010(3)(a) defines obscene as meaning "to the average person, applying contemporary community standards, the predominant appeal of the matter taken as a whole, is to prurient interest in sexual conduct." Said language, passed by the Kentucky Legislature pursuant to the requirements of *Miller* v. *California, supra,* makes no reference whatsoever to the test of obscenity being whether the average person has in the past, is in the present, or will in the future, tolerate the type of matter being depicted. By way of analogy, the petitioners' argument at the trial level and on appeal that if the distribution of certain matter has been tolerated, it must not be a crime, would be analogous to an argument that since various violent crimes occur in the community, they have been tolerated and are, therefore, not crimes.

Just as the word "tolerance" has been used by the Supreme Court in its decision, so has the word "accept." Mr. Chief Justice Berger, writing for the

majority of the court, observed in *Miller* v. *California, supra,* "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine and Mississippi 'accept' public depiction of conduct found tolerable in Las Vegas or New York City." No where in *Miller* v. *California,* or progenies, is there any requirement that a tolerance instruction be given and the trial court did not abuse its discretion in denying such a tolerance instruction.

VI.

The Jury Instructions as Given Did Not Impermissibly Chill the Petitioners' Rights to Disseminate Materials.

First of all, it should again be pointed out that the films and establishment in question did advertise and portray the material being shown in a manner such as would justify a "pandering" instruction. The evidence produced at trial showed that the names of the films, "Getting Off" and "Painful Desires" were intended to appeal to the prurient interest, the Cinema X Theatre had posted statements or advertisements to the effect that "we show all four star movies", "if sexually exploitation offends you, do not enter", and that the "films shown are sexually explicit".

The jury instruction in question did make reference to circumstances of dissemination of the material and said instruction was proper under *Gindsburg* v. *U. S.,* 383 U. S. 463 (1966), *Splayn* v. *California,* 431 U. S. 595 (1977) and *Pinkus* v. *U. S.,* 436 U. S. 293 (1978).

VII.

Only General, Not Specific, Scienter as to the Nature, Character, and Content of the Sexually Explicit Materials Must Be Shown.

The petitioners have alleged that their conviction was obtained by relying on a "constructive" knowledge standard which they claim was constitutionally insufficient to support a conviction.

It should first be pointed out that there was not any jury instruction whatsoever that would permit the jury to convict based upon constructive knowledge rather than actual knowledge.

The instruction actually given was to the effect that a person had the requisite knowledge of content and character when he or she was aware that the film showed or depicted explicit sexual conduct whether or not such person had precise knowledge of the specific contents of the film. Kentucky Revised Statute 531.020 (1) makes no mention whatsoever of specific knowledge but merely states that "a person is guilty of distributing of obscene matter when, having knowledge of its content or character, he . . ."

As previously mentioned in the statement of the case, as to all the petitioners, there was an abundance of proof through various sources and means as to the extensive intermingling and knowledge by all of the petitioners of the nature, content and character of the type of material that was being shown at the Cinema X Theatre. The court properly instructed the jury that "knowledge, content and character" means having

general knowledge of the nature, content and character of the material. A person has such knowledge when he or she is aware that the film shows or depicts explicit sexual conduct whether or not such person has precise knowledge of the specific contents of the films. Such knowledge may be proven by direct or circumstantial evidence, or both. *Hambling* v. *United States,* 418 U. S. 87, 119-20 (1974); *United States* v. *Orioto,* 413 U. S. 139 (1973); *U. S.* v. *Thedis,* 484 F. 2d 1149, 1153 (5th Cir. 1973); *U. S.* v. *Hill,* 500 F. 2d 733, 740 (5th Cir. 1974).

It would be an absurd result if defendants such as the within petitioners could escape prosecution and responsibility for the distribution of obscene matter as long as they could show that they had not seen the specific films in question and, therefore, did not know the nature nor the character and contents of the sexually explict material that was being exhibited. The type and amount of scienter argued for by the petitioners would allow for such an absurd result.

VIII.

The Motion Picture Films "Getting Off" and "Painful Desires" Are Obscene and Therefore Excluded From Constitutional Protection.

Simply put, the Petitioners' final argument is that this Court should review the two films in issue and find that they are not obscene as a matter of law. Although the Respondent would encourage this honorable court to review the films to see how preposterous their argu-

ment is, the previous holdings of this court do not require such a review.

Petitioners have cited only three opinions from this court dealing with motion pictures in support of their argument, and all were either decided or dealt with a trial which took place prior to the decision in *Miller* v. *California,* 413 U. S. 15 (1973). The same is true of all the cases cited under this issue which dealt with press materials, not motion pictures.

Rather than being a case standing as the origin of an independent review doctrine, *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962) was a case where Mr. Justice Harlan and Mr. Justice Stewart were of the opinion that three magazines were not obscene under postal regulations found at 18 U.S.C. 1461. *Jacobellis* v. *Ohio,* 378 U. S. 174 (1964) did at least deal with a motion picture, described as having only one fragmentary and fleeting explicit love scene. Mr. Justice Brennan and Mr. Justice Goldberg found that such a film was not obscene under the then applicable constitutional standards, and Mr. Justice Stewart simply stated that it was not hardcore pornography. Finally, *Jenkins* v. *Georgia,* 418 U. S. 153 (1974) dealt with a trial held before the guidelines of *Miller* were handed down, and it dealt with a film Carnal Knowledge, wherein sex acts were simply understood to be taking place and no explicit sex acts were actually exhibited.

In sharp contrast to the above are the films "Getting Off" and "Painful Desires," wherein the jury found both films to be obscene under a Kentucky por-

nography law specifically revised in 1974 to comply with this court's mandate in *Miller*. Petitioners have represented to this court that the films' contents is similar to the materials reviewed in *Jenkins*, when nothing could be further from the truth. Although the subject matter of both films is sex, they differ like night and day from the materials in *Jenkins* for the films are made up of the following explicit sex scenes: numerous specific and explicit acts of sexual intercourse, oral sodomy, anal sodomy, cunnilingus, flagellation, insertion of foreign objects into vaginal area, ejaculation of semen into the mouths, faces and bodies of individuals, and numerous other acts of sexual contact and gratification. An independent review of these films by the court will show the dominance of obscene material. *Kois* v. *Wisconsin*, 408 U. S. 229 (1972).

As found by the jury in the case at bar, the motion picture films "Getting Off" and "Painful Desires" are obscene. They do constitute hard core sexual material. As such, they have no constitutional protection under the First and Fourteenth Amendments of the United States Constitution. The Petitioners' convictions should therefore be affirmed.

CONCLUSION

Wherefore, the Commonwealth of Kentucky respectfully submits that all the proceedings of the trial court were proper and without error, that the Kentucky Court of Appeals and the Kentucky Supreme Court properly denied discretionary review, that there are no special or extraordinary reasons for the U. S. Supreme Court to grant discretionary review, and that, therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. WEHR
Assistant Campbell County Attorney and Special Assistant Attorney General

JUSTIN D. VERST
Assistant Campbell County Attorney and Special Assistant Attorney General
331 York Street
Newport, Kentucky 41071
Telephone: (606) 491-5843

Attorneys for Respondent, Commonwealth of Kentucky